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MEMORANDUM FOR HENRY O. LAMAR, JR.
ACTING NATIONAL TAXPAYER ADVOCATE

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CC:NTA

SUBJECT: Legal Authority of the Taxpayer Advocate -
Historical Development

Introduction

The purpose of this memorandum is to present an analysis of the authority of the Taxpayer Advocate under current law. The first section sets forth the historical development of the Taxpayer Advocate program, including the evolution involving the Taxpayer Advocate, Problem Resolution Officers ("PROs") and Problem Resolution Program ("PRP") caseworkers over the last 23 years. The second section explains the differences between the delegated and statutory authorities of the National Taxpayer Advocate ("NTA") and the interpretation of I.R.C. section 7811, which provides the authority to issue Taxpayer Assistance Orders ("TAOs"). Understanding the history of the Taxpayer Advocate program helps to interpret section 7811 and to answer the questions that have arisen since July 1998 over the Taxpayer Advocate Service's ("TAS") authority to resolve or to direct resolution of taxpayer cases.

Summary of Conclusions

1. Over the last 24 years, the Taxpayer Advocate has been granted authority to take various actions through a series of administrative delegations and statutory grants. This process began in the late 1970s with the Ombudsman and the PROs, who had no authority to resolve taxpayer cases, but had responsibility for the oversight of "problem" cases that the IRS' functional units would resolve. In 1988, the Taxpayer Advocate received administrative and then statutory authority to direct the IRS to take certain remedial actions. Then, in the early 1990s, again first by administrative delegation and then by statute, that authority was expanded so that the Advocate could direct the IRS to take certain affirmative actions. In 1998, the Taxpayer Advocate received authority

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to direct actions to resolve systemic problems. Most recently, the National Taxpayer Advocate received authority and will soon receive additional authority to resolve many routine taxpayer cases independently of the IRS functional areas.

2. The National Taxpayer Advocate exercises two different kinds of authority with respect to taxpayer cases: delegated and statutory.

a. Delegated authority to act in taxpayer cases comes from a series of memoranda from Commissioner Rossotti and from agency-wide Delegation Orders based on actions by previous Commissioners. It permits the Advocates to handle specific taxpayer cases where normal IRS processes or procedures have failed.

b. Statutory authority comes from section 7811, which permits an Advocate to issue a TAO in a case where a taxpayer is suffering or about to suffer significant hardship as a result of the manner in which the IRS is administering the tax laws. In essence, section 7811 authorizes the Taxpayer Advocate to issue TAOs directing the IRS to take a wide range of procedural actions with respect to a taxpayer cases. In our view, section 7811 does not authorize the Taxpayer Advocates to issue TAOs directing the IRS to reach a particular result regarding a taxpayer's liability.

Background and Legal Analysis

This section sets forth the evolution of the Taxpayer Advocate program, including PRP. It provides a historical survey of the developments leading to the establishment of the Office of the National Taxpayer Advocate and the authority the organization has had over time to help taxpayers with the resolution of their issues with the IRS. This section is arranged chronologically and linked directly to three major pieces of taxpayer relief legislation enacted between 1988 and 1998.

I. Origins of the Taxpayer Advocate Program

A. Problem Resolution Program (1977)

More than a decade before the enactment of the Taxpayer Bill of Rights I ("TBOR I") in November 1988, the IRS established a national Problem Resolution Program. This program was created in May 1977 following a successful pilot project of taxpayer complaint units in four districts (Austin, Milwaukee, Detroit, and Dallas) in 1976. The Service conducted this project in response to complaints from taxpayers, Congress, consumer groups and others that the Service was not being responsive or sensitive to taxpayer complaints and concerns. The test was an effort to measure how well the existing organization and procedures identified taxpayer problems and complaints and

whether those problems were resolved fairly and efficiently. In addition to helping taxpayers during the project, the test was designed to identify the types, variety and volume of complaints, as well as to determine whether existing procedures were resolving problems promptly and properly. The pilot program provided sufficient evidence of the need for and the effectiveness of a complaint resolution process. As a result, the IRS developed and implemented the PRP nationwide.

The purpose of the PRP was to (1) provide taxpayers with an advocate within the IRS to assist when regular processes and procedures failed to resolve taxpayer concerns, (2) ensure that taxpayer problems are resolved promptly and efficiently, and (3) enable the IRS to identify organizational, procedural, and systemic problems and recommend corrective action when and where necessary. The Assistant Commissioner (Taxpayer Service and Returns Processing) had national responsibility for the PRP.

Problem Resolution Officers ("PROs") were designated in each district as a part of the district director's immediate staff. PROs managed the PRP at the local levels and worked on cases involving second or subsequent inquiries by a taxpayer on the same complaint or problem when normal processing time had expired, cases that IRS employees and supervisors believed could not be resolved through existing procedures, persistent problems seen by division chiefs and district directors, and cases where taxpayers specifically contacted PRP with a problem, complaint or inquiry. PROs resolved issues that they could, but had no procedural or functional authority. PROs were responsible for monitoring the cases to ensure that the functional units, such as Collection and Examination, took appropriate actions to resolve taxpayer issues. In the event that a functional unit did not act to resolve a taxpayer's case, a PRO's recourse was to their common manager, the district director.

PRP units were established in the functional units in the districts and were not separate and independent organizations. PRP caseworkers were employees of the districts and formally worked in the functions, but were assigned to work on the PRP cases that the PRO monitored. In other words, the PRO was not the line manager of the district's PRP caseworkers. As district employees, PRP caseworkers exercised authority in taxpayer cases that flowed through and from their district director, generally in the form of redelegations or functional statements. That meant they could take any action in a PRP case that they were authorized to perform in their normal duties. For example, a Collection Division PRP caseworker could take collection actions on a PRP case, but could not take actions that an Examination Division PRP caseworker could take.

B. Taxpayer Ombudsman (1979)

To heighten awareness of the program and to provide it national significance, the Service created the office of the Taxpayer Ombudsman in 1979 within the office of the

Commissioner and assigned the Ombudsman the responsibility for the national management of the PRP. The PRP was also expanded to service centers and to regional offices during this period.

Similar to the district structure, service center and regional PROs reported to the service center directors or regional commissioners, but did not have line authority over the PRP caseworkers or authority to act in taxpayer cases. The PRP caseworkers reported to the functional units and exercised their functional authority in PRP cases as a result of delegations through and from the service center directors and regional commissioners.

C. Taxpayer Assistance Actions (1988)

In March 1988, prior to the enactment of TBOR I, the Commissioner announced a new initiative authorizing PROs to issue "taxpayer assistance actions" to suspend enforcement actions or expedite procedures (such as issuing a refund) where the requirements of the Internal Revenue Code had been met. This is the first time that the PROs could direct the IRS to take action in a taxpayer's case. The stated purpose of this initiative was to elevate the status of PRP within the organization, to make all parts of the Service aware of the legitimacy of taxpayer hardship cases and to assure taxpayers and their representatives that the Service is concerned and will provide relief in cases of significant hardship. See Remarks by Commissioner Lawrence Gibbs before the Ninth Annual Federal Tax Day sponsored by the New Jersey Institute for Continuing Legal Education and the New Jersey State Bar Association, March 10, 1988.

D. Summary of Authority

The office of the Taxpayer Ombudsman and the PRP developed out of the need to provide a means of resolving taxpayer cases when normal processes and procedures failed. Both the office of the Taxpayer Ombudsman and the PRP were administrative creations. The Ombudsman had the authority to ensure that taxpayer problems received appropriate review and consideration by the applicable IRS function and to take taxpayer cases out of the standard administrative process until that review was complete, but the Taxpayer Ombudsman had no authority to effect results or to correct problems independently. In other words, the Ombudsman could intervene on behalf of a taxpayer as an advocate, but could not directly provide relief to the taxpayer. Relief actions were carried out by the functional units, with the assistance of or through the PRP caseworkers, who reported to and exercised the authority of the functional units.

II. Taxpayer Ombudsman Program in the Era of TBOR 1 (1988-1996)

A. TBOR I

Congress codified the position of the Taxpayer Ombudsman in TBOR I (part of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), P.L. 100-647). In enacting section 7811 of the Internal Revenue Code, TBOR I also codified taxpayer assistance actions, calling them TAOs and permitting the Taxpayer Ombudsman to issue them if a taxpayer was suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws were being administered. See section 7811(a). In addition to the authority to order the release of a levy, a TAO could direct the Service to take either of two remedial steps, "cease any action or refrain from taking any action," but could not require the Service to take affirmative action.¹ See section 7811(b). Further, subsection (b) permitted those actions with respect to three specific chapters of the Internal Revenue Code (chapter 64, subchapter B of chapter 70 and chapter 78), as well as a catchall for similar provisions. TBOR I became effective on January 1, 1989.

At the time TBOR I was enacted, the administrative delegations to the Taxpayer Ombudsman by the Service did not provide any authority to change technical or substantive decisions of the Service. In TBOR 1, there is no indication in section 7811 or its legislative history that Congress intended such a change.² In fact, the "Present Law" section of the legislative history to TBOR I provides that

¹ Under TBOR I, section 7811(b) provided that:

The terms of a Taxpayer Assistance Order may require the Secretary -

- (1) to release property of the taxpayer levied upon, or
- (2) to cease any action, or refrain from taking any action, with respect to the taxpayer under -
 - (A) chapter 64 (relating to collection),
 - (B) subchapter (B) of chapter 70 (relating to bankruptcy and receiverships),
 - (C) chapter 78 (relating to discovery of liability and enforcement of title), or
 - (D) any other provision of law which is specifically described by the Ombudsman in such order.

² Prior to the enactment of TBOR I, the IRM clearly stated that while PROs had no authority to overturn technical decisions made by the functions, they were expected to raise to the appropriate management level any case or issue in which the PRO believed that procedures were not being followed or an incorrect decision had been reached. See IRM 1279, Problem Resolution Handbook, Section 230 (6) (MT 1279-58, June 28, 1988).

The Taxpayer Ombudsman administers the IRS Problem Resolution Program, which is designed to resolve a wide range of tax administration problems that are not remedied through normal operating procedures or administrative channels. The Ombudsman may issue orders to affect immediate review of an IRS action. The authority of the Ombudsman, however does not permit the Ombudsman to change a technical decision.

Conference Report on the Technical and Miscellaneous Revenue Act of 1988, H. Rep. 100-1104 at 215 (emphasis added). The report also states that a TAO may require the same remedial actions as the statute provides. Id. Consequently, the Treasury Regulations implementing section 7811, which were proposed in March 1989 and finalized in March 1992, also provide that a taxpayer assistance order cannot be used to contest the merits of a tax liability or as a substitute for established administrative or judicial procedure. See Treas. Reg. § 301.7811-1(c)(3).

B. Delegation Order 232

Effective January 1, 1989, the Taxpayer Ombudsman, through Order No. 232, delegated the authority to issue, modify, or rescind TAOs to various agency officials with Problem Resolution personnel on their staffs.³ Since Problem Resolution personnel reported to those agency officials and there was no line authority between the Taxpayer Ombudsman and Problem Resolution personnel, this delegation allowed TAOs to be issued by the PROs in the various offices.

This delegation order also limited the authority to release principal residence seizures or to cease action relating to principal residences to regional commissioners and to the Assistant Commissioner (International).

C. Delegation Order 233

On January 24, 1989, the Commissioner issued Delegation Order 233, authorizing the Taxpayer Ombudsman and PROs to:

- (1) approve replacement refund checks that were lost or stolen when the taxpayer's account does not indicate a balance due and hardship or unreasonable delay exists,

³ Delegation Order 232 was revised on October 23, 1989 solely to add the Assistant Commissioner (Employee Plans and Exempt Organizations) to the list of IRS officials authorized to modify or rescind TAOs.

(2) substantiate payment credits to taxpayer accounts on PRP cases where the taxpayer provides proof of payment, but the Service cannot locate the payment within a reasonable period of time, and

(3) abate for reasonable cause all automatically assessed penalties and Form W-4 civil penalties.

This delegation provides that the authorities granted above be exercised only after compliance with existing IRM procedures. See Delegation Order 233 (January 24, 1989). (Based on published IRM provisions, it appears that PROs were exercising this authority at least as early as June 1988, although the effective date of the delegation order was January 24, 1989.) This appears to be the first instance of PROs having the authority to act independently in taxpayer cases, rather than having the PRP caseworkers take the appropriate action in a taxpayer case. The action permitted, however, does not involve any determination of the taxpayer's tax liability.

D. Delegation Order 239

The Commissioner further expanded the authority of the Taxpayer Ombudsman and other functions within the Service in January 1992 by providing the authority for TAOs on issues not specifically covered by section 7811. In cases of significant hardship that the Service can relieve, the Commissioner authorized the issuance of TAOs for affirmative acts. See Delegation Order 239 (January 31, 1992). Prior to Order 239, a TAO could direct only remedial action.

The Delegation Order provides examples of situations in which a TAO may order affirmative actions. While the list is not all-inclusive, every example of an affirmative action concerns procedural direction to a functional unit with respect to a taxpayer case, such as Examination reconsiderations and expedited consideration of refund claims. In other words, the Delegation Order does not permit the Ombudsman to direct a result in a taxpayer case, but rather to direct the functional area to act more quickly or re-examine its determination in a taxpayer's case. This point becomes important in interpreting future changes to section 7811 and is discussed in Part V below.

In January 1996, the Commissioner amended Delegation Order 239 again to clarify that the Taxpayer Ombudsman is authorized to intervene on the taxpayer's behalf and to take certain affirmative actions in taxpayer cases, such as issuing a TAO to expedite a refund to a taxpayer to relieve hardship or to stay enforcement action until a determination is made as to the appropriateness of the action. This amendment included many of the provisions that the House of Representatives would include in the Taxpayer Bill of Rights II, which would be enacted in another six months. For example, the Ombudsman was required to prepare an annual report detailing the most serious

problems faced by taxpayers dealing with the Service. The report also required the Ombudsman to provide suggested solutions, administrative or legislative, to the identified problems and to track the Service's response to suggestions for administrative changes. See Delegation Order 239 (Rev. 1) (January 10, 1996).

E. Revised Delegation Order 232

On this same date, the Commissioner amended the prior delegation by the Taxpayer Ombudsman in Order 232 to limit the authority under section 7811(c) to modify or rescind TAOs.⁴ The revised Order provided that only the Commissioner, the Deputy Commissioner, or the Taxpayer Ombudsman could modify or rescind a TAO. This amendment was intended to "reassure taxpayers that TAOs will be accorded the greatest respect and consideration by the IRS." See Delegation Order No. 232 (Rev. 2), as published at 61 FR 764 (January 10, 1996).

F. Summary of Authority

The enactment of TBOR I provides the first statutory authority for the Taxpayer Ombudsman to intervene in cases where a taxpayer is suffering a significant hardship. Section 7811 was, in large part, a codification of the authority administratively provided to the Taxpayer Ombudsman and to the PRP by the Commissioner. The statutory authority is generally limited to actions that stop internal processes until such time as taxpayer issues can be addressed.

The authority provided by statute was further supplemented by administrative authority delegated by the Commissioner to undertake some affirmative acts on behalf of taxpayers. Those affirmative acts were limited to procedural direction to a functional unit with respect to a taxpayer case, such as Examination reconsiderations and expedited consideration of refund claims. The expanded authority of the Taxpayer Ombudsman and PROs continued to be with regard to administrative and procedural functions and did not permit a TAO to override technical decisions made by the functions.

⁴ Under TBOR I, section 7811(c) allowed a TAO to be modified or rescinded by the Ombudsman, district directors, service center directors, compliance center directors, regional directors of appeals, and any superior of these persons.

III. Taxpayer Bill of Rights II (1996 - 1998)

A. TBOR II

On July 30, 1996, the Taxpayer Bill of Rights II ("TBOR II"), P.L. 104-168, was enacted. In what was essentially a codification of Delegation Order 239, TBOR II amended sections 7803 and 7811, creating the Office of the Taxpayer Advocate, replacing the Taxpayer Ombudsman with the Taxpayer Advocate, requiring two annual reports to Congress and expanding the TAO authority such a TAO could require (1) action by the Secretary within a specified period of time and (2) affirmative action by the Secretary.⁵ TBOR II also limited the authority to modify or rescind TAOs to the Commissioner, the Deputy Commissioner and the Taxpayer Advocate.

B. Delegation Order 250

The authority of the Taxpayer Advocate was again expanded by the Commissioner in March 1998 with the creation of the Taxpayer Advocate Directive ("TAD") and the Proposed TAD. Through Delegation Order 250, the Commissioner authorized the National Office Taxpayer Advocate (soon to be known as the "National Taxpayer Advocate") to mandate administrative or procedural changes by the functional areas if the Advocate believes that a process or procedure creates undue burden, infringes upon the rights of taxpayers, or results in inequitable treatment and the Taxpayer Advocate has recommended an administrative or procedural change by the functional area to improve the process or to grant relief to groups of taxpayers. This authority was provided solely to the National Office Taxpayer Advocate and could not be redelegated.

⁵ With the enactment of TBOR II, section 7811(b) was amended to provide that:

The terms of a Taxpayer Assistance Order may require the Secretary *within a specified time period* -

(1) to release property of the taxpayer levied upon, or
 (2) to cease any action, *take any action as permitted by law*, or refrain from taking any action, with respect to the taxpayer under -

- (A) chapter 64 (relating to collection),
- (B) subchapter B of chapter 70 (relating to bankruptcy and receiverships),
- (C) chapter 78 (relating to discovery of liability and enforcement of title), or
- (D) any other provision of law which is specifically described by the Taxpayer Advocate in such order.

I.R.C. § 7811(b), as amended by section 102 of Pub. L. 104-168 (emphasis added).

See Delegation Order No. 250 (March 17, 1998). Further, a recipient may appeal a TAD to the Deputy Commissioner, who, along with the Commissioner and National Taxpayer Advocate, are the only persons authorized to modify or rescind a TAD. While the Taxpayer Advocate could alert the Commissioner or Congress to such issues in the past through the Annual Report, Delegation Order 250 represents the first time that the Taxpayer Advocate can take action within the IRS to address systemic concerns rather than only taxpayer-specific concerns.

C. Summary of Authority

TBOR II codified several actions the IRS had taken administratively, such as requiring the Advocate issue two annual reports. It also permitted a TAO to require action by the Service within a specified time frame, allowed a TAO to be used to provide affirmative relief for taxpayers, and codified the modification and rescission limitations on TAOs previously established in Delegation Order 232 (Rev. 2).⁶

The Commissioner also expanded the Advocate's sphere of responsibility and elevated the importance of the "advocacy" work of the office by authorizing the Taxpayer Advocate to issue TADs. As a result, the Taxpayer Advocate could address systemic problems or problems facing a group of taxpayers with a formal instrument that would come to the attention of the Commissioner more quickly than through the annual reports.

IV. Internal Revenue Service Restructuring and Reform Act of 1998

A. RRA 98

The Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98"), P.L. 105-206 (July 22, 1998) revamped the entire Taxpayer Advocate/Problem Resolution Program. RRA 98 replaced the Taxpayer Advocate with the NTA who is appointed by the Secretary of Treasury, but reports to the Commissioner. The Act also created an independent reporting structure for Taxpayer Advocate employees. The local Taxpayer Advocates, who replaced the former Problem Resolution personnel, now report directly to the NTA or his delegate, instead of reporting to a District or Service center director. RRA 98 also required that a Taxpayer Advocate be available for every state.

⁶ On April 16, 1997, the Taxpayer Advocate revised Delegation Order 232 again, primarily to reflect the change in the Advocate's organizational structure from PROs and Regional PROs to field Taxpayer Advocates.

In addition to revamping the Advocate organization, RRA 98 also amended section 7811(a) to provide that the NTA may issue a TAO if the taxpayer meets other requirements set forth by regulation⁷, in addition to the previous standard of whether the taxpayer is suffering or about to suffer a significant hardship. In deciding whether to issue a TAO, the NTA is now also required to construe all factors in a manner most favorable to the taxpayer when a Service employee has failed to follow published administrative guidance, which includes the IRM. See I.R.C. § 7811(a)(3).

In addressing TAO authority, prior versions of section 7811 were silent as to the meaning of significant hardship. RRA 98, however, amended section 7811 to require that significant hardship under this section include:

- (1) an immediate threat of adverse action;
- (2) a delay of more than 30 days in resolving taxpayer account problems;
- (3) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or
- (4) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.

See I.R.C. § 7811(a)(2).

The RRA 98 amendments to section 7811(a) expand when a TAO may be issued, thus allowing more taxpayers to apply for a TAO, but the amendments do not expand the scope of what a TAO may be issued to do.

B. Commissioner's Memoranda regarding Authorities

In May and November 1999, the Commissioner issued memoranda that constituted interim delegations of authority to the NTA. The May memorandum provided largely administrative authorities, such as approval of tours of duty and travel vouchers, but also provided some substantive authority, such as issuing manual refunds that are

⁷ Because of the regulatory requirement, section 7811(a)(1)(B) is not self-implementing. Since regulations have not been issued yet, there is currently no operative grant of authority for the Taxpayer Advocates to issue TAO on a basis other than hardship. At present, the situations in which this broader grant of authority would be in the best interests of tax administration are unclear, although it is possibly that such situations will be identified in the future. Generally, however, any regulations promulgated would be unable to grant to the NTA authority broader than that of the Commissioner. Compare sections 7803(a) and 7803(c).

otherwise appropriate refunds⁸ and abating interest on erroneous refunds. In the November memorandum, the Commissioner provided the NTA the authority, once the taxpayer demonstrates hardship, to make specific kinds of routine account adjustments in cases where there is no disagreement within the Service as to the appropriate action to be taken. For example, the Taxpayer Advocate Service may accept an installment agreement request where a taxpayer meets the statutory criteria for an automatic installment agreement. The NTA and his delegates are required to exercise this authority in accordance with the rules and procedures that apply to other Service functions exercising the same authorities. (See discussion at V.A. below.)

C. Taxpayer Advocate Service

In keeping with RRA 98's direction to revamp the organization structure, the Taxpayer Advocate organization renamed itself the Taxpayer Advocate Service ("TAS"). The organization officially "stood up" on March 12, 2000 with approximately 2300 employees in 74 local offices, 9 area offices and the National Office headquarters.

D. NTA's Request for Additional Authorities

In July 2000, the NTA requested that the Commissioner delegate the TAS the authority to handle "routine" taxpayer cases, as defined in the Taxpayer Advocate Service modernization design. The authority requested ranged from various kinds of interest abatement to audit reconsiderations to additional disclosure authority. While the Commissioner has not yet issued the memorandum, the Advocates will receive additional authority to handle routine taxpayer cases in January 2001.

V. Analysis of Current Law

As mentioned above, the Taxpayer Advocates exercise two different kinds of authority with respect to taxpayer cases: delegated⁹ and statutory. Generally, delegated authority permits the Advocates to perform specific functions in taxpayer cases. Thus far, delegated authority has been provided by the Commissioner through delegation order and by memorandum. Statutory authority comes from section 7811, which

⁸ This memorandum did not provide the Advocates with authority to determine whether a refund was appropriate in a taxpayer's case, but rather to issue a manual refund where a taxpayer was experiencing a hardship as a result of not receiving the refund to which he or she was entitled.

⁹ While the Advocates' delegated authority also encompasses administrative authority, this section of the memorandum will use the phrase "delegated authority" to refer to their substantive authority to act in taxpayer cases.

permits the Advocates to issue TAOs. This section will explain the differences between the Advocate's delegated and statutory authority with regard to taxpayer cases and also discuss the interpretation of section 7811.

A. Delegated Authority to Act in Taxpayer Cases

The TAS has certain authorities, both administrative and substantive, pursuant to agency-wide delegation orders. The administrative authority permits the NTA and his delegates to manage the day-to-day operations of the TAS, such as setting tours of duty and taking personnel actions. The substantive authority is generally that which the Commissioner has delegated broadly across the IRS, such as the authority to issue refunds manually and to abate interest on erroneous refunds.

According to TAS' role in the agency as envisioned in the modernization design, the Commissioner also has delegated to the NTA by memorandum the authority to perform specific, routine functions in taxpayer cases. In the modernization design, "routine" was defined to include

cases that can generally be resolved through the application of standard procedures and guidelines to a given set of facts and circumstances. Little independent judgment is required to arrive at the appropriate solution, and no in-depth research or investigation is necessary to discern the facts of the case. These cases are usually customer-service problems and include only the most straightforward compliance issues.

The authority envisioned by the modernization design was provided to the NTA in part by the memorandum dated November 2, 1999, which was discussed briefly above. This authority will be supplemented by another memorandum in January 2001.

The Commissioner's memoranda delegating authority became necessary when RRA 98 made the Taxpayer Advocate Service a separate and independent organization within the IRS. Before the TAS "stood up" on March 12, 2000, PRP caseworkers were employees of the Districts and Service centers. As such, they exercised authority in taxpayer cases that flowed through and from their district or service center director, generally in the form of redelegations or functional statements. That meant they could take any action in a PRP case that they were authorized to perform in their normal duties (e.g., an Examination PRP caseworker could grant a refund claim, but could not accept an offer to compromise a tax liability because that authority resided in Collection).

When the TAS stood up, IRS employees who joined the new Advocate organization no

longer reported to the directors, but instead to the NTA. They could no longer exercise their old authority as functional employees because they were taken out of the management chain that provided their authority. As a result, the Taxpayer Advocates needed a separate grant of authority from the Commissioner in order to act in taxpayer cases.

Because the TAS was designed to handle routine cases in which the normal IRS processes or procedures had failed, the authority delegated to the Taxpayer Advocates to handle taxpayer cases has been Customer Service authority. The exercise of the authority also has been subject to the same IRM policies and procedures as Customer Service, which means that, once the taxpayer meets the hardship criteria to be included in the TAS program, a Taxpayer Advocate must follow the same procedures in the case as a Customer Service employee would. In other words, significant hardship will get a taxpayer into TAS, but will not affect what substantive actions a Taxpayer Advocate can take in a case. These delegations to the TAS allow the IRS to provide the service taxpayers need when the normal processes fail or when a taxpayer has a hardship while ensuring consistent application of the tax laws to similarly situated taxpayers.

For example, the Commissioner's November 1999 memorandum provides the Taxpayer Advocates with the authority to accept installment agreements under the Customer Service IRM procedures. Assume a taxpayer requested an installment agreement, but the IRS has taken more than 30 days longer than the procedures contemplate to work the taxpayer's request. The TAS then may accept the case because the delay qualifies as a hardship under section 7811(a)(2)(B). At that point, the Taxpayer Advocate can consider the taxpayer's request for an installment agreement. The TAS, based on the delegation, will use the same procedures and considerations as a Customer Service employee would and, other than the hardship that got the taxpayer into TAS, will not consider hardship as a basis for the agreement. If the taxpayer does not qualify for an agreement under the Customer Service procedures, the Taxpayer Advocate, like the rest of the agency, may not accept the agreement. In other words, the taxpayer's case qualified for special handling because the normal IRS process did not work as it should, but the taxpayer did not get a different result by going to the TAS than any other taxpayer whose installment agreement request is handled in a timely fashion by Customer Service.

B. Statutory Authority to Issue TAOs

The Taxpayer Advocates also have statutory authority to act in taxpayer cases pursuant to section 7811. That provision permits the National Taxpayer Advocate to issue a TAO directing the IRS to take certain actions where a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the IRS is administering the tax laws.

Particularly since the enactment of RRA 98, there has been some question about the interpretation of section 7811(b) and whether a TAO may direct a different result regarding a liability in a taxpayer's case. The following material discusses the interpretation of section 7811 in an attempt to answer that question. This interpretation is based on the statutory language, the historical origins of the provision and the evolution of the statute, including those episodes of administrative action that were later codified in the statute.

1. IRC section 7811(a) and (b)

Section 7811(a) grants the Advocates the discretionary authority to issue TAOs.¹⁰ It requires that, in order for the Taxpayer Advocate to consider issuing a TAO, a taxpayer demonstrate the existence of hardship or an imminent hardship due to the administration of the tax laws. In other words, section 7811(a) describes the circumstances in which a Taxpayer Advocate may issue a TAO.

Section 7811(b) sets forth the relief that a TAO can direct if taxpayer hardship exists and the Taxpayer Advocate decides a TAO may be warranted.¹¹ In other words, it

¹⁰ (a) AUTHORITY TO ISSUE.—

(1) IN GENERAL.—Upon application filed by a taxpayer with the Office of the Taxpayer Advocate (in such form, manner, and at such time as the Secretary shall by regulations prescribe), the National Taxpayer Advocate may issue a Taxpayer Assistance Order if—

(A) the National Taxpayer Advocate determines the taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary; or

(B) the taxpayer meets such other requirements as are set forth in regulations prescribed by the Secretary.

(2) DETERMINATION OF HARDSHIP.—For purposes of paragraph (1), a significant hardship shall include—

(A) an immediate threat of adverse action;

(B) a delay of more than 30 days in resolving taxpayer account problems;

(C) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or

(D) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.

¹¹ (b) TERMS OF A TAXPAYER ASSISTANCE ORDER.—The terms of a Taxpayer Assistance Order may require the Secretary within a specified time period—

(1) to release property of the taxpayer levied upon, or

(2) to cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer under —

(A) chapter 64 (relating to collection),

describes what a TAO can order another IRS function to do.

2. Parameters for Relief in Section 7811(b)(2)

Some have argued that section 7811(b)(2) permits Taxpayer Advocate to issue TAOs to direct the IRS to reach a particular result regarding a taxpayer's liability. In particular, the argument focuses on two points in section 7811(b)(2): the interpretation of the catchall at subparagraph (D) in section 7811(b)(2) and the meaning of "take any action as permitted by law" in section 7811(b)(2). This section will analyze section 7811(b)(2) and show that the appropriate interpretation of the statute permits Taxpayer Advocates to issue TAOs that direct the IRS to take procedural action in a taxpayer's case, not that direct a result under the substantive provisions of the Internal Revenue Code regarding the amount of a taxpayer's liability.

a. The Catch-All Phrase at Subparagraph (D)

Some have argued that the catchall found in subparagraph (D) of section 7811(b)(2) should be interpreted to mean that a TAO can direct the IRS to take any action as long as the TAO specifies an Internal Revenue Code provision. As discussed below, this is not a correct interpretation as it requires that subparagraph (D) be read in isolation from the preceding subparagraphs.

The correct interpretation of the statute reads the catchall phrase in subparagraph (D) in the context of the list that precedes it. This reading is based on a well-established principle of statutory interpretation, *ejusdem generis*, which means that a general catchall phrase following a specific list of items is "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland, Statutory Construction (1992 ed.) sec. 47.17 n.4. As explained in more detail below, this principle means that the catchall phrase of subparagraph (D) cannot properly be read to expand the scope of TAO authority beyond the procedural actions "similar in nature to" the list that precedes it (*i.e.*, sec. 7811(b)(2)(A) through (C)).

To be specific, section 7811(b)(2) permits a TAO to direct certain actions with respect to the taxpayer under

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- (B) subchapter B of chapter 70 (relating to bankruptcy and receiverships),
 - (C) chapter 78 (relating to discovery of liability and enforcement of title), or
 - (D) any other provision of law which is specifically described by the National Taxpayer Advocate in such order.

- (A) chapter 64 (relating to collection),
- (B) subchapter B of chapter 70 (relating to bankruptcy and receiverships),
- (C) chapter 78 (relating to discovery of liability and enforcement of title), or
- (D) any other provision of law which is specifically described by the National Taxpayer Advocate in such order.

This version of paragraph (2) was enacted in 1988 and, other than the TBOR II changes discussed below, has not changed since that time.

The chapters listed at (A) through (C) are part of subtitle F of the Internal Revenue Code, which is entitled "Procedure and Administration." See attached IRC table of contents. These chapters address matters such as how tax is collected and how an examination occurs. The chapters do not address substantive issues, such as the character of income or whether a taxpayer qualifies as an innocent spouse.

According to the principle of *ejusdem generis*, subparagraph (D), which is the catchall above, should be interpreted in a manner consistent with (A) through (C). Rather than trying to anticipate every procedural situation in which a TAO might be warranted, the statute includes a catchall to authorize issuance of a TAO in situations similar to those covered by subparagraphs (A) through (C). If subparagraph (D) were not limited in that way, there would be no need for the illustrative list that precedes the catchall. The statute could simply read "with respect to the taxpayer under any provision of law which is specifically described by the National Taxpayer Advocate in such order." Therefore, subparagraph (D) should be interpreted consistently with subparagraphs (A) through (C) such that TAOs can be issued on procedural matters, but not on substantive matters.

This conclusion is also supported by the overall structure and language of section 7811 that provides the basic grant of authority to the Taxpayer Advocates to issue TAOs. Section 7811(a)(1)(A) permits a TAO where a taxpayer is experiencing a hardship "as a result of the manner in which the internal revenue laws are being administered". This language, with the use of "manner" and "administered," arguably contemplates relief from the way in which the tax laws are managed or enforced, rather than relief from the tax laws themselves.

In addition to the statutory language, the existing regulations support that conclusion. The regulations were proposed in March 1989 and finalized in March 1992. While certain parts have been superseded by statutory changes, those sections interpreting

unchanged parts of the statute remain valid.¹² Treasury Regulation section 301.7811-1(c)(3) spells out the scope of a TAO. It provides that a TAO "will not be issued to contest the merits of any tax liability nor is a taxpayer assistance order intended to be a substitute for or an addition to any established administrative or judicial review procedure."

The regulation was promulgated close in time to the statute and contemporaneously to the events occurring within PRP and the Taxpayer Advocate program, as described above. It directly supports the conclusion that a TAO was not meant to direct substantive determinations of tax liability. The regulation, instead, reinforces the primary responsibility of the existing administrative and judicial processes, such as the IRS Office of Appeals, for that function.

This interpretation of subparagraph (D) as permitting only the direction of procedural action is also supported by the legislative history to the 1988 Act. As noted above, subparagraphs (A) through (D) have not changed since first enacted in 1988. Under the heading "Present Law", the relevant legislative history summarized the then-existing rules as follows:

the Taxpayer Ombudsman administers the IRS Problem Resolution Program, which is designed to resolve a wide range of tax administration problems that are not remedied through normal operating procedures or administrative channels. The Ombudsman may issue orders to affect immediate review of an IRS action. The authority of the Ombudsman, however does not permit the Ombudsman to change a technical decision.

Conference Report on the Technical and Miscellaneous Revenue Act of 1988, H. Rep. 100-1104 at 215 (emphasis added). There is no evidence either in the House provisions, the Senate amendments or the Conference agreements of the three relevant pieces of legislation to suggest that Congress intended to changed this limitation on the Ombudsman's authority.

b. "Take Any Action as Permitted by Law"

The second argument made to support a broader scope for TAOs is based on the words "take any action as permitted by law" in section 7811(b)(2). Referring to that phrase, the argument is that a TAO can direct any action permitted by law with respect to a taxpayer's case, particularly since RRA 98 clearly comprehends an enhanced

¹² In fact, paragraph (2) has remained unchanged since 1988 other than the addition of "take any action as permitted by law" and the authority to impose a time period in which to act.

mission for the TAS. As explained below, the correct interpretation of this phrase, given the history behind the provision and general principles of statutory construction, is that a TAO may require the IRS to "take any action as permitted by law . . . with respect to the taxpayer under . . . (A) through (D)." That construction limits the phrase to certain actions authorized in the list of (A) through (D) discussed above, rather than using an overly expansive interpretation that permits the Taxpayer Advocate to direct the Secretary to take any action, as long as it is in accord with the law.

The original, TBOR I version of section 7811(b)(2) said that "[t]he terms of a Taxpayer Assistance Order may require the Secretary . . . to cease any action, or refrain from taking any action, with respect to the taxpayer under . . ." the list set forth above at (A) through (D). It did not contain the phrase "take any action as permitted by law."

At the time TBOR II added this language to the statute, the Commissioner had recently authorized TAOs to direct affirmative acts regarding procedural issues, such as ordering expedited refunds in hardship cases. The progression of events clearly indicates that the addition of "take any action as permitted by law" essentially was intended to codify the authority to direct affirmative, procedural actions, such as reconsiderations, already provided by the Commissioner. At some point after TBOR II, the procedural guide for PRP, which was called the PRP Handbook, said that "[t]he authority previously delegated by the Commissioner to issue TAOs to take positive action with respect to a taxpayer's case is now granted by statute." This shows that the Advocates have long recognized that the phrase "take any action as permitted by law" was limited to the types of procedural actions generally understood to be within the scope of Delegation Order 239.

In addition to the history behind the provision, the structure of the statute supports a limited reading of "take any action as permitted by law". TBOR 2 inserted the phrase into the middle of the list of what was previously two items: "cease any action" and "refrain from taking any action". Under the general principles of statutory construction and basic grammar, no one of the three phrases in the section 7811(b)(2) list should be interpreted out of context with the remainder of the sentence. In other words, "with respect to the taxpayer under" modifies each of the phrases "cease any action", "take any action as permitted by law" and "refrain from taking any action" and not just one of them.

This interpretation is also supported by the regulations. Treasury Regulation section 301.7811-1 provides that a TAO may be issued to "[s]top any action or refrain from taking further action against a taxpayer pursuant to . . .". Treas. Reg. sec. 301.7811-1(c)(1)(ii). When "take any action as permitted by law" was added to section 7811(b)(2) in 1996, it was added in the middle of the list. Had the regulations been updated for this section, it is clear that "pursuant to" also would have modified the new phrase. The

proper interpretation is that "with respect to the taxpayer under" modifies "take any action as permitted by law" just as it does the other two phrases.

Some have argued that the legislative history to TBOR II supports the broader interpretation that a TAO can be issued to direct any action as long as the action is legal. The House Committee Report says

the bill provides the Taxpayer Advocate with broader authority to affirmatively take any action as permitted by law with respect to taxpayers who would otherwise suffer a significant hardship as a result of the manner in which the IRS is administering the tax laws.

Like the legislative history to TBOR II, the 1988 Act legislative history does not mention the limiting language of "with respect to the taxpayer under" followed by the list at subparagraph (A) through (D). It provides:

The Taxpayer Ombudsman is provided statutory authority to issue a taxpayer assistance order, if, in the determination of the Ombudsman, the taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the IRS is administering the internal revenue laws.

To read the TBOR II legislative history as permitting the broader interpretation of "take any action as permitted by law" would mean that, for consistency purposes, the similar language in the 1988 Act legislative history should also be read such that "with respect to the taxpayer under" does not modify the first phrase "cease any action". That is inconsistent with the statute's construction, as well as the rest of the legislative history for the original section 7811⁴, and there is no indication that Congress intended such a dramatic change in 1996.

Further, RRA 98, even though it contemplated an enhanced mission for the TAS, did not add or amend the statutory language "take any action as permitted by law". Thus, arguing that the role of the TAS somehow changes the interpretation of the statutory language that pre-existed TAS cannot be correct.

It is our view that, based on the statutory language, the existing regulations, the legislative history and the evolution of section 7811, it is apparent that TAOs may be issued to direct the IRS to take procedural actions with regard to a taxpayer's case. We

⁴ It is also inconsistent with the statute that the legislative history to TBOR II describes the Taxpayer Advocate as affirmatively taking action instead of issuing a TAO to direct action.

believe that the statute does not authorize Taxpayer Advocates to issue TAOs either directing the IRS to reach a particular result regarding a taxpayer's liability or making a substantive determination of a taxpayer's liability.